

## **APPENDIX A, PART 3 — CONTRACT REQUESTS, CLAIMS AND APPEALS**

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#### SUBPART 100 - AUTHORITIES

##### A3-100 Scope of Subpart.

This subpart sets forth the authorities of contracting officers, Division Commanders, Boards of Contract Appeals, and Federal courts to decide contract requests, claims and appeals. Further, the authority for Corps of Engineers' trial attorneys to represent the Government before the Boards is stated.

##### A3-101 Contracting Officers.

The contracting officer's authority to decide or settle all claims relating to a contract is contained in FAR 33.211. A contracting officer's decision is final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced. 41 U.S.C. 605(b).

##### A3-102 Division Commanders.

In appeals to Boards of Contract Appeals, the Division Commander has command management responsibility. In exercising this responsibility, the Division Commander has authority to review military and civil works contract appeals and to participate in alternative dispute resolution (ADR).

##### A3-103 Boards of Contract Appeals.

The Contract Disputes Act of 1978, as amended, 41 U.S.C. 601-613, provides that a contractor may appeal a contracting officer's final decision to the appropriate Board of Contract Appeals or to the United States Court of Federal Claims. A contractor has ninety days from receipt of a contracting officer's final decision to file an appeal with the appropriate Board of Contract Appeals. 41 U.S.C. 606.

a. Armed Services Board of Contract Appeals (ASBCA).

1. Designation. The charter and rules of the ASBCA are found in DFARS, Appendix A.

b. Corps of Engineers Board of Contract Appeals (ENG BCA).

(a) Contract Disputes. The ASBCA has been designated by the Secretary of the Army as the agency Board of Contract Appeals on military contracts.

(b) Real Estate Leases. Although no specific delegation exists, the ASBCA has jurisdiction for military funded leases (where the Government is the lessee) under the Contract Disputes Act of 1978. See Yukong Ltd., ASBCA Nos. 27666, 28364, 84-1 B.C.A. 17,035; cf. Bill Griffiths, ASBCA No. 47437, 94-3 B.C.A. 27,225 (holding that the ASBCA lacks jurisdiction to hear disputes related to outleases of the Army's civil and military real property as such jurisdiction properly lies with the ENG BCA).

2. Correspondence. All correspondence with the ASBCA will be addressed to the Recorder, Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, Virginia 22041-3208. Copies of all significant correspondence addressed to the ASBCA Recorder will be sent to the Engineer Chief Trial Attorney, HQUSACE.

3. Engineer Chief Trial Attorney. The Engineer Chief Trial Attorney under a delegation from the Secretary of the Army is the authorized representative of the Secretary of the Army and has the sole authority and responsibility for the conduct and control of litigation of contract disputes for all Corps of Engineers cases docketed with the ASBCA of a value less than \$3 million. AFARS 33.212-90(a)(ii). The Assistant Judge Advocate General for Civil Law may determine on a case by case basis to delegate Corps of Engineers cases of a value of \$3 million or more to the Engineer Chief Trial Attorney. AFARS 33.212-90(a)(iii). The Engineer Chief Trial Attorney also has the authority to settle such cases with the concurrence of either the contracting officer, the Head of Contracting Activity, or the Assistant Secretary of the Army (Research, Development and Acquisition). AFARS 33.212-90-7. All official correspondence with the Engineer Chief Trial Attorney will be addressed to the current Chief Trial Attorney (by name), CECC-F, U.S. Army Corps of Engineers, Washington, D.C. 20314-1000.

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1. Designation. The charter of the ENG BCA is set forth in Appendix A, Part 1. The rules of the ENG BCA are set forth in Appendix A, Part 2.

(a) Contract Disputes. The ENG BCA has been designated by the Chief of Engineers under a delegation from the Secretary of the Army as the agency Board of Contract Appeals on civil works contracts. The ENG BCA may, by special arrangement, handle appeals other than those within its primary jurisdiction.

(b) Real Estate Leases. The ENG BCA has been designated by the Chief of Engineers under a delegation from the Secretary of the Army as the agency Board of Contract Appeals for disputes related to outleases of the Army's civil and military real property. See Lombardo's Lakeview Resort, Inc., ENG BCA No. 5873-F, 94-2 B.C.A. 26,650.

2. Correspondence. All correspondence with the ENG BCA will be addressed to the Recorder, Corps of Engineers Board of Contract Appeals, CEBA, Room 2103, Pulaski Building, 20 Massachusetts Avenue, N.W., Washington, D.C. 20314-1000. Copies of all significant correspondence addressed to the ENG BCA Recorder will be sent to the Engineer Chief Trial Attorney.

3. Engineer Chief Trial Attorney. The Engineer Chief Trial Attorney is the authorized representative of the Chief of Engineers and has sole authority and responsibility for the conduct and control of litigation of all Corps of Engineers contract disputes docketed with the ENG BCA. All official correspondence with the Engineer Chief Trial Attorney will be addressed to the current Chief Trial Attorney (by name), CECC-F, U.S. Army Corps of Engineers, Washington, D.C. 20314-1000.

#### A3-104 Federal Courts.

The Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25, abolished the U.S. Court of Claims and established the United States Court of Appeals for the Federal Circuit and

the U.S. Claims Court with jurisdiction over contract disputes formerly within the jurisdiction of the U.S. Court of Claims. This act was amended by the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Public Law 102-572, 106 Stat. 4516, which changed the name of the United States Claims Court to the United States Court of Federal Claims.

a. U.S. Court of Federal Claims. Under the Contract Disputes Act, a contractor may, in lieu of appealing a contracting officer's final decision to a Board, bring an action directly on a claim in the U.S. Court of Federal Claims within one year of receipt of the contracting officer's final decision. 41 U.S.C. 609(a)(3). The Department of Justice is responsible for the litigation of such cases and will be assisted by a Corps of Engineers attorney.

b. U.S. Court of Appeals for the Federal Circuit. A decision of a Board of Contract Appeals may be appealed by the Contractor or the Government to the U.S. Court of Appeals for the Federal Circuit within 120 days. 41 U.S.C. 607(g)(1)(A). A decision of the U.S. Court of Federal Claims may be appealed within 60 days after the date of entry of judgment. FED. R. APP. P. 4(a)(1). In an appeal from a Board decision, the decision of the Board on any question of law is not final or conclusive, but the U.S. Court of Appeals for the Federal Circuit will not set aside conclusions on questions of fact unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence. 41 U.S.C. 609(b).

c. Correspondence with the Department of Justice. The litigation report on contract claims and appeals for the Department of Justice will be addressed to the Chief Trial Attorney, HQUSACE, except in those instances when time does not permit and prior telephonic approval of deviation from this procedure is obtained from the Chief Trial Attorney. Copies of all other significant correspondence will be sent to the Chief Trial Attorney.

#### A3-200 Scope of Subpart.

#### SUBPART 200 - CLAIMS

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This subpart sets forth procedures for considering and processing contract requests and claims.

#### A3-201 Background.

The Contract Disputes Act establishes procedures and requirements for asserting and resolving contract claims subject to the Act. The Act provides for a final written decision of the contracting officer when the claim cannot be resolved by agreement of the contracting parties. The contractor may appeal a contracting officer's final decision to the appropriate Board of Contract Appeals within 90 days of receiving the decision. Alternatively, the contractor may also bring an action directly in the U.S. Court of Federal Claims within 12 months of the contracting officer's final decision. These time limitations are jurisdictional and there is no authority for an extension of these time limitations. A contracting officer may change, modify or recall the decision within the appeal period. If the decision is changed or modified, a new appeal period begins to run. Policies and procedures for processing contract claims, as well as the definition of key terms, are set forth in FAR 33.2, and DFARS 233.70.

#### A3-202 Policy.

As set forth in FAR 33.204, the Government's policy is to attempt to resolve all contractual issues in controversy at the contracting officer level. Reasonable efforts should be made to resolve controversies prior to submission of a claim. Agencies are encouraged to use Alternative Dispute

b. Initial Investigation of a Claim. A contract claim for which all certification requirements have been met shall be subject to a thorough fact finding investigation conducted by appropriate staff members, including an attorney from the Office of Counsel. During this investigation, the attorney will determine the scope of the review, evaluate the relevancy and materiality of the facts considered, and take appropriate measures to preserve the documentation, including written statements and affidavits. After the investigation has been completed and the staff recommendations have been considered, the contracting officer should offer the contractor an

Resolution (ADR) procedures to the maximum extent practicable.

#### A3-203 Claim Processing Procedures.

Any written request by a contractor for the payment of money, granting of time adjustment or interpretation of contract terms or other relief arising under or relating to the contract, even if the amount of money or time requested is unstated, may become a contract claim against the Government. If not included in the original request, the contractor should immediately be asked to furnish documentation: e.g., facts, cost breakdown, or the contract clause underlying the claim. Some requests can be resolved in a relatively short period of time. Every effort should be made to resolve such requests as soon as possible.

a. Certification Requirements. A contractor is required to certify all claims exceeding \$100,000.

The Administrative Dispute Resolution Act of 1996, Public Law 104-320, 110 Stat. 3870, amended the previous Alternative Dispute Resolution Act and eliminated the additional certification requirement when a dispute resolution procedure is used. The certification should state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

opportunity to attend a conference to discuss the claim. An attorney from the Office of Counsel should participate in this conference. If the contract claim has merit in whole or part, an attempt should be made to negotiate quantum, either at the conference or at a later time agreed to by the parties.

c. Alternative Dispute Resolution (ADR). Contracting officers and trial attorneys are strongly encouraged to consider the use of ADR techniques in all claims at the earliest possible time. These ADR techniques include, but are not limited to, nonbinding arbitration, mediation, and mini-trial. The policy of

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the Corps of Engineers is not to use binding arbitration. The use of ADR shall be timely recorded in CMIS, or its successor. See A3-207.

d. Unresolved Claims. When a claim by or against a contractor cannot be settled, the contracting officer shall issue a written decision on the claim. On claims by a contractor, the decision will be issued within 60 days of the receipt of the written request for a decision from the contractor for claims under \$100,000; for claims over \$100,000 the contracting officer will, within 60 days, either issue a decision or notify the contractor of the date on which a decision will be issued. For claims over \$100,000, the contracting officer's final decision shall be issued within a reasonable period after the receipt of the claim. 41 U.S.C. 605(c)(3).

1. Contracting Officer's Final Decision. The written decision of the contracting officer may be in any appropriate form. The basic requirements are that the decision include a description of the claim, a reference to the pertinent contract terms, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's final decision with supporting rationale. The decision must also include a demand for payment in cases where the decision results in a finding that the contractor is indebted to the Government (affirmative Government claim). The decision must be written to inform the contractor of the facts and reasons upon which the contracting officer's conclusion is based that the decision is final. To adequately meet the above requirements the facts shall be separately presented in a Findings of Fact section as part of the decision.

(a) Findings of Fact. The proposed Findings of Fact with supporting data properly tabbed will be drafted by an Office of Counsel attorney with technical assistance from other appropriate staff.

(3) The third part of the decision should be the Findings of Fact, in narrative form. Conclusions or arguments should not be included. The Findings of Fact will consist of (a) a statement of facts relevant to the claim, and (b) a reference to the pertinent bidding documents and contract provisions. Quotations from standard contract clauses should normally be avoided; however, non-standard clauses relied upon by the contracting officer should be quoted. All documents mentioned should be referred

to by a tab number where they can be found in the potential appeal file. If possible, agreed and disputed facts should be so identified.

members. When a claim in excess of \$100,000 involves a factual dispute, the contracting officer may send the contractor a copy of the proposed Findings of Fact and advise that the supporting data may be reviewed at the office of the contracting officer. The contractor should be requested to indicate in writing whether it concurs in the proposed Findings of Fact and, if not, to indicate specifically which facts it is not in agreement with and submit material in rebuttal. After reviewing the contractor's comments and making any appropriate corrections in the Findings of Fact, the contracting officer shall then issue the decision. If an appeal is filed, the appeal file should include the contractor's response to the request for comment on proposed Findings of Fact.

(b) Decision. The contracting officer's final decision will be drafted by an Office of Counsel attorney. Prior to issuing the decision, the contracting officer will become familiar with all facts and proposed conclusions contained in the draft and either adopt them as the Findings of Fact and decision or make such changes as deemed appropriate.

(1) The first paragraph of the decision is appropriate for introductory matter, including a reference to the contract number and date and a brief description of the contract work and the location thereof.

(2) The next part of the decision should be a summary of the contractor's claim(s), including any revisions. Each claim document mentioned will reference a tab number where the document can be located in the potential appeal file. In arranging the tabs for the potential appeal file, the first two tabs should be reserved for the notice of appeal and the contracting officer's final decision.

to by a tab number where they can be found in the potential appeal file. If possible, agreed and disputed facts should be so identified.

(4) The fourth part should be the contracting officer's analysis or conclusions based upon the Findings of Fact. New facts and case citations should normally not be included in this part. After an appropriate discussion and analysis, the contracting

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officer should make a clear, simple statement which sets forth the determination on the contract claim.

(5) The last paragraph of the decision should clearly state that the writing is the contracting officer's final decision and advise the contractor of its appeal rights.

2. Notification of Appeal Rights. This paragraph should be included at the end of a contracting officer's final decision:

"This is the final decision of the Contracting Officer. This decision may be appealed to the (Armed Services) (Corps of Engineers) Board of Contract Appeals (Address). If you decide to appeal, you must mail or otherwise furnish written notice thereof to the (Armed Services) (Corps of Engineers) Board of Contract Appeals within 90 days from the date you receive this decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall reference this decision, and identify the contract by number. With regard to appeals to the (Armed Services) (Corps of Engineers) Board of Contract Appeals you may, solely at your election, proceed under the Board's small claims procedure for claims of \$50,000 or less or its accelerated procedures for claims of \$100,000 or less. In lieu of appealing to the (Armed Services) (Corps of Engineers) Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims (except as provided in the Contract Disputes Act, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

a. All Government personnel must exercise care to prevent premature destruction of contract administration and finance records that are involved in claims and appeals before Boards and Federal courts. Contract files containing these records are sometimes retired or destroyed before all claims and appeals have been fully resolved. In the process of retiring

3. Transmittal of the Contracting Officer's Final Decision. The contracting officer's final decision with the Findings of Fact shall be transmitted by certified or registered mail, return receipt requested, to the contractor's address shown on the initial contract page or by another reasonable method that evidences receipt by the contractor. The contractor may request, in writing, that a different address be utilized if the specific purpose is identified, i.e., receipt of formal contracting officer's final decision.

#### A3-204 Affirmative Claims.

Contract claims by the Government should also be processed under these guidelines.

#### A3-205 Maritime Contract Claims.

The Contract Disputes Act contains a separate provision for the consideration of claims and appeals of maritime contracts.

a. Contracts for the repair of ships are maritime contracts under the Contract Disputes Act. Appeals arising out of maritime contracts are covered separately by the Suits in Admiralty Act. Jurisdiction to hear these appeals is in the U.S. district courts, not the U.S. Court of Federal Claims. When rendering a decision on a claim arising out of a maritime contract, contracting officers must advise the contractor of its right to appeal the decision to a U.S. district court.

b. Contracts for the construction of ships - as opposed to contracts for the repair of ships - are not considered maritime contracts. Claims and appeals arising out of contracts for the construction of ships will be administered in the same manner as other claims and appeals subject to the Contract Disputes Act.

#### A3-206 Maintenance of Records.

records, documents that do not appear to have a permanent value are often discarded, such as handwritten memoranda and preliminary drafts. Therefore, it is important to identify such material during the investigation required by A3-203(b) and to provide for its retention. See DFARS 204.804.

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b. To avoid closeout of an official contract file prior to completion of a pending appeal, all contract files involving an appeal shall be retained intact for seven years after the date of the final Board or Federal court decision in the case. In an appeal dismissed by the Board or Federal court with prejudice based on stipulation of the parties, or request of the contractor following the settlement of the appeal, this requirement does not apply.

#### **A3-207 Claims Management and Case Tracking.**

Each Office of Counsel is required to enter all its claims more than 90 days old into the USACE Legal Services Automated Case Management System - CMIS, or its successor. The following information must be entered for every claim: the name of the contractor, the contract number, the project and location, the date relief was requested or the certification date, the relief requested, the attorney assigned to the claim, and a brief narrative description of the facts and issues. The database should be updated as significant events occur. When the contracting officer renders a final decision or a claim is settled, the claim should be closed on the database and the following information entered within 5 working days: the disposition of the claim (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

### **SUBPART 300 - PROCEDURES FOR HANDLING APPEALS AT BOARDS OF CONTRACT APPEALS**

#### **A3-300 Scope of Subpart.**

2. Appeals of \$3 million or more. The Assistant Judge Advocate General (TAJAG) for Civil Law may determine, on a case by case basis, to delegate Corps of Engineers cases of a value of \$3 million or more to the Engineer Chief Trial Attorney. AFARS 33.212-90(a)(iii). Within 14 days of receipt of a Notice of Appeal in an ASBCA case of \$3 million or more, the assigned trial attorney shall transmit to the Engineer Chief Trial Attorney, a memorandum describing the nature of the claim and recommending whether the Engineer Chief Trial

This subpart sets forth the procedures for handling contract appeals before the ASBCA and the ENG BCA. Throughout this subpart, the term local counsel shall mean District Counsel, Operating Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel.

#### **A3-301 Notice of Appeal.**

Normally, the contractor will send a Notice of Appeal directly to the Board and will furnish a copy to the contracting officer. If the original Notice of Appeal is received by the contracting officer, however, it should be promptly forwarded to the appropriate Board and a copy sent to the Division and to the Chief Trial Attorney. Specifically, for military contracts, any notice of appeal received directly shall be promptly forwarded to the Chairman, Armed Services Board of Contract Appeals, 5109 Leesburg Pike, Suite 703, Falls Church, VA 22041-3208 and include the envelope showing the postmark when the notice of appeal was received by mail. AFARS 33.212-90-1(a).

#### **A3-302 Nature of Appeals - General.**

a. ASBCA Appeals. For all trial documents which require the signature of the Engineer Chief Trial Attorney, the signature block shall read Engineer Chief Trial Attorney .

1. Appeals under \$3 million. The Engineer Chief Trial Attorney is the authorized representative of the Secretary of the Army and has sole authority and responsibility for the conduct and control of litigation of contract disputes for all Corps of Engineers cases docketed with the ASBCA of a value of less than \$3 million. AFARS 33.212-90(a)(ii).

Attorney should seek delegation from TAJAG under AFARS 33.212(a)(iii). A copy of the contracting officer's final decision, if issued, shall accompany this memorandum. The Engineer Chief Trial Attorney shall forward a recommendation to TAJAG.

b. ENG BCA Appeals. The Engineer Chief Trial Attorney is the authorized representative of the Chief of Engineers and has sole authority and responsibility for the conduct and control of litigation of all Corps of Engineers contract disputes docketed



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with the ENG BCA. For all trial documents which require the signature of the Engineer Chief Trial Attorney, the signature block shall read Chief Trial Attorney .

#### A3-303 Appeal File (Rule 4).

a. General. In Rule 4 of the ASBCA and the ENG BCA, the contracting officer is responsible for assembling and transmitting to the Board an appeal file consisting of all documents pertinent to the appeal. Normally, appeal files are prepared by the Office of Counsel. The appeal file shall include the compilation of documents described in Rule 4 of the ASBCA and ENG BCA and shall be prepared in accordance with this section.

#### b. Filing Procedure.

1. General. The appeal file shall be forwarded directly to the Board. At the time the appeal file is forwarded, the contracting officer will furnish the appellant a copy of each document except the contract. The letter of transmittal to the Board shall state that this has been done. An abbreviated

c. Form. Appeal files will be assembled in either secure binders fastened at the top or left side with acco or similar type fasteners, three-ring binders, or as otherwise directed by the Board. Each document will be separated by a divider with a tab attached. In accordance with Board rules, the tabs should be numbered sequentially. The tab numbers may be preprinted, hand printed, or typed on the tab.

If the appeal file is voluminous, it should be divided into two or more volumes. The cover of each volume shall identify it as the appeal file and include the appeal caption, contract number, docket number, and volume number. Additionally, an index of documents shall be placed in the front of all volumes of the appeal file. Drawings may be placed in a separate volume. Generally, drawings should be placed in the appeal file in the following or other comparable manner: (1) insert a sealed manila envelope into the assembly, punching holes at the top, or left side, so that the top, left side and bottom are even with the remaining documents; (2) cut the right envelope side open, parallel to the right edge of the remaining documents; and (3) fold the drawings so that they can be inserted and removed from the right side of the envelope. When a complete set of specifications or

copy of the appeal file consisting only of the transmittal letter, contracting officer's final decision, and claim letter shall be forwarded to the Chief Trial Attorney. A copy of the appeal file shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as required.

#### 2. Minimum Number of Copies.

a. ASBCA Appeals. Unless otherwise directed by the Board, one copy of the complete appeal file shall be forwarded to the Board.

b. ENG BCA Appeals. Unless otherwise directed by the Board, two copies of the complete appeal file shall be forwarded to the Board.

3. Appeal File Supplements. Additional material may be submitted as a supplement to the appeal file and a copy simultaneously furnished to the appellant. Any supplements to the appeal file will be forwarded to the Board in the same manner as the original appeal file. Tab numbers in an appeal file supplement shall begin with S .

drawings is furnished, it should be identified as an appendix to the appeal file which can be easily reviewed, e.g., a complete set of specifications similar to the basic appeal file; a complete set, or several drawings clearly marked, rolled, and placed in a shipping tube. Specifications and drawings need only be submitted to the Board. When large documentary exhibits are included in the appeal file, such exhibits shall be paginated for easier reference.

#### A3-304 Trial Attorneys.

#### a. Qualifications - [RESERVED]

b. Appointment. The local counsel shall assign the Government Trial Attorney. Only Type III qualified trial attorneys may be assigned as lead counsel on appeals of Type III cases. For every appeal, the Chief Trial Attorney and the Chief Counsel reserve the authority to disapprove the assignment of a particular trial attorney or to remove the trial attorney once assigned.

c. Duties. The trial attorney is expected to personally prepare and present the Government's case.

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The trial attorney is expected to follow all of the customary rules of professional conduct, including the duty to ensure that documents and pleadings which require the signature the Chief Trial Attorney are forwarded to the Chief Trial Attorney so that they may be timely filed. The trial attorney will review the appeal file to ascertain if the Government's position is adequately supported and the appeal is timely. In the event the appeal is untimely, the trial attorney shall immediately follow the procedure discussed in A3-306(b) for filing a Motion to Dismiss.

1. Prior to Hearings. In ENG BCA hearings outside Washington, D.C., the trial attorney shall secure a hearing room and obtain reporting service. Subsequent to the hearing, the trial attorney will furnish the original transcript to the Recorder, ENG BCA, as soon as it is received. Prior to either a hearing before the ENG BCA or ASBCA, the trial attorney shall seek to obtain a written stipulation from a pro se appellant or a represented appellant's counsel which states whether or not quantum will be an issue at the hearing.

2. Upon Discovery of New Evidence or Facts. If, before or during the presentation of the Government's case, the trial attorney discovers or is informed of new facts or evidence which require re-evaluation of the Government's potential liability, a prompt and direct review shall be made and the contracting officer advised. The trial attorney shall inform the contracting officer of the previously unknown facts or evidence, provide an initial determination of the impact upon the Government's case, and make a recommendation to the contracting officer as to possible settlement or other action.

2. ENG BCA Appeals. The answer shall be filed directly by the trial attorney with the Board. The answer shall be signed by the trial attorney and local counsel. A copy of the answer shall be provided by the trial attorney to Division Counsels in Command and Control Divisions, as each requires, and to the Chief Trial Attorney.

b. Government Complaints. In appeals of affirmative Government claims, the Boards often require the Government to file the complaint. A Government complaint shall conform to the Federal

3. All Government Personnel. The contracting officer and other Government personnel shall assist the trial attorney in case preparation and presentation as requested by the trial attorney.

#### A3-305 Pleadings.

a. Answer. An answer should conform to the Federal Rules of Civil Procedure, i.e., admit, deny, or allege according to each specific allegation in the complaint; followed by a second section which outlines the Government's affirmative defenses. An answer shall be neatly typed, double spaced, and prepared on letter size paper. If appellant's complaint is in letter form, as opposed to traditional numbered paragraph form, the trial attorney should assign paragraph numbers to each paragraph contained in the letter, and base the answer on these numbered paragraphs.

1. ASBCA Appeals. The answer shall include signature blocks for the trial attorney and the Engineer Chief Trial Attorney. The trial attorney shall forward the original and three copies of the signed answer directly to the Chief Trial Attorney for signature and filing. The trial attorney shall also forward along with the answer one copy of the complaint and an envelope addressed to the Appellant's counsel (or Appellant where pro se). The correspondence forwarding these items shall indicate the date the answer must be filed with the Board. A copy of the answer shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires.

Rules of Civil Procedure. The trial attorney shall follow the procedures described above.

#### A3-306 Motions.

Motions will be neatly typed, double spaced, and prepared on letter size paper. Motions should be supported by an accompanying memorandum, prepared according to the above guidelines, which states relevant facts and identifies the statutes, regulations, and other legal authorities which support the motion. The memorandum shall have the same signatures as the motion and be filed according to the

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procedures outlined below. The memorandum should conform to the customary style and professional standards covering presentation, argument, and citation of authorities.

a. **Non-Dispositive Motions.** Most non-dispositive motions shall be filed directly by the trial attorney with the ENG BCA and the ASBCA. These include: motion for an extension of time; motion to compel; motion to amend; motion to strike; and motion to suspend proceeding. The motion shall be signed by the trial attorney and local counsel. A copy of the motion shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires and to the Chief Trial Attorney. Pursuant to Rule 16 of the ASBCA and ENG BCA, the trial attorney is responsible for forwarding a copy of the motion to the Appellant's counsel (or Appellant where pro se). The correspondence transmitting the motion to the Board shall indicate that this has been done.

b. **Dispositive Motions and Motions Raising Significant Issues.** Jurisdictional motions, motions invoking executive privilege, dispositive motions, motions for reconsideration, and motions for sanctions shall be signed by the trial attorney. The original and two copies shall be forwarded to the Chief Trial Attorney for signature and filing with the Board. A copy of such a motion shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires. The correspondence transmitting the motion to the Chief

2. **ENG BCA Appeals.** Briefs in Type I and Type II ENG BCA appeals shall be signed by the trial attorney and local counsel and filed directly with the Board. A copy of the brief shall be provided by the trial attorney to Division Counsels in Command and Control Divisions, as each requires, and to the Chief Trial Attorney.

(a) **Pre-hearing Briefs.** Under ENG BCA Rule 9, the trial attorney is responsible for simultaneously furnishing a copy of the pre-hearing brief to the Appellant's counsel (or Appellant where pro se). The correspondence transmitting the motion to the Board shall indicate that this has been done.

(b) **Post-hearing Briefs.** The trial attorney shall forward the original and one copy of the post-

Trial Attorney shall indicate the date, if any, the motion must be received by the Board and include an envelope addressed to the Appellant's counsel (or Appellant where pro se). Pursuant to Rule 16 of the ASBCA and ENG BCA, the Chief Trial attorney is responsible for forwarding a copy of the motion to the Appellant's counsel (or Appellant where pro se).

#### A3-307 Briefs.

Briefs shall be neatly typed, double spaced on letter size paper, and bound by a front and back cover made of plastic, cardboard, or heavy paper. All briefs should conform to the customary style and professional standards covering presentation, argument, and citation of authorities.

a. **Briefs on Type I and Type II Appeals.**

1. **ASBCA Appeals.** Briefs in Type I and Type II ASBCA appeals shall be signed by the trial attorney and the original and two copies forwarded to the Chief Trial Attorney for signature and filing with the Board. A copy of the brief shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires. The correspondence transmitting the brief to the Chief Trial Attorney shall indicate the date the brief must be received by the Board and include an envelope addressed to the Appellant's counsel (or Appellant where pro se).

hearing brief to the Board. This submission shall also include an envelope addressed to the Appellant's counsel (or Appellant where pro se).

b. **Type III Appeals.** Briefs in Type III appeals shall be signed by the trial attorney and the original and two copies forwarded to the Chief Trial Attorney for signature and filing with the Board. A copy of the brief shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires. The correspondence transmitting the brief to the Chief Trial Attorney shall indicate the date the brief must be received by the Board and include an envelope addressed to the Appellant's counsel (or Appellant where pro se).

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#### A3-308 Discovery.

Discovery is covered by Rule 14 of both the ASBCA and the ENG BCA and should generally follow the Federal Rules of Civil Procedure. All Government personnel are encouraged to assist the trial attorney in voluntary discovery procedures. Any deposition or discovery procedure, however, that is designed to annoy, embarrass, harass, or place an undue burden upon the Government will be vigorously opposed.

#### A3-309 Alternative Dispute Resolution (ADR).

Trial attorneys are encouraged to engage in ADR of contract claims and appeals to the maximum extent practicable.

a. Third Party Assisted. Neutral and impartial third parties may be used in mediation, mini-trial, non-binding arbitration, and dispute review Boards. The policy of the Corps of Engineers is not to use binding arbitration.

b. Board Assisted. Both ASBCA and ENG BCA administrative judges are available for ADR. At the inception of an appeal, the Board provides its notice regarding ADR to the parties. The notice describes Board ADR policies and procedures. The ADR procedures used by the Board include: settlement judge, mini-trial, summary trial with binding

b. Procedure. A stipulation of dismissal shall be prepared for all settled appeals. This should be submitted by the trial attorney directly with the Board. A copy of this document shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires and to the Chief Trial Attorney.

#### A3-311 Decisions.

a. Notice. The trial attorney is responsible for notifying the Chief Trial Attorney of all decisions rendered by a Board. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Chief Trial Attorney. A copy of the decision shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires.

decision, and other agreed methods. Prior to agreeing to participate in a summary trial with binding decision process, the trial attorney must request and receive from the Chief Counsel a waiver of the Government's right to appeal the decision. The memorandum requesting waiver shall be forwarded to the Chief Counsel through the Chief Trial Attorney and shall briefly set forth the factual background of the appeal.

#### A3-310 Settlement.

a. Authority. The authority and responsibility to settle contract appeals docketed with the ASBCA and the ENG BCA remain with the contracting officer. AFARS 33.212-90-7(a).; J.W. Bateson Co., Inc., ASBCA No. 24425, 84-1 BCA 16,942. The contracting officer shall advise the trial attorney of all offers of settlement from a contractor, whether such offer is made by the contractor or through the contractor's attorney. The contracting officer shall consult with the trial attorney before accepting a contractor's offer of settlement and before making a settlement offer to the contractor. Additionally, the Chief Trial Attorney has the independent authority to settle ASBCA cases with the concurrence of either the contracting officer, the Head of the Contracting Activity, or the Assistant Secretary of the Army (Research, Development and Acquisition).

b. Motion for Reconsideration. Under Rule 29 of the ASBCA and the ENG BCA, either party may file a motion for reconsideration within 30 days of receipt of the decision. Prior to preparing such a motion, the trial attorney must receive authorization from the Chief Trial Attorney. The motion and its supporting memorandum shall be prepared in accordance with Board Rule 29 and A3-306.

c. Appeals to the U.S. Court of Appeals for the Federal Circuit. When the trial attorney wants to appeal a Board's decision to the U.S. Court of Appeals for the Federal Circuit, a request to initiate such an action should be made through command channels to the Chief Trial Attorney within ten calendar days after receipt of the decision. The request shall state the bases for the appeal pursuant to the review standard of the Contract Disputes Act, 41

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U.S.C. 609(b). The Chief Trial Attorney shall coordinate with the Office of the Army General Counsel, and the Chief Counsel shall make the final agency recommendation decision to the Department of Justice. The appeal must be made by the Department of Justice within 120 days of receipt of the decision by the Government. 41 U.S.C. 607(g)(1)(B).

d. Payment. A payment to an appellant from a Board decision shall be made promptly from available project appropriations. If projects funds are not readily available or extraordinary circumstances exist, the Judgment Fund as provided for in the Contract Disputes Act, 41 U.S.C. 612, may be used. Such use requires the prior approval of the Chief Trial Attorney. A request to use the Judgment Fund will be submitted with supporting documentation to the Chief Trial Attorney.

#### **A3-312 Attorney Fee Claims.**

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, a qualifying appellant may recover fees and other expenses incurred in connection with the appeal if it prevails either through a favorable settlement or Board decision and when the Government's position was not substantially justified.

As a jurisdictional matter, EAJA requires that a Board receive an appellant's application for an award of fees and other expenses within 30 days of final disposition of the matter. An EAJA claim may be

b. Updating Appeal Information. The database should be updated as significant events occur, including the filing of pleadings, dispositive motions and briefs, and the scheduling of hearings, and ADR procedures. When the Board renders a decision or a case is settled and dismissed by the Board, the appeal should be closed on the database and the following information should be entered within 5 working days: the disposition of the appeal (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

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settled by the contracting officer pursuant to A3-310.

Upon receipt of a request for fees and expenses under EAJA, the trial attorney responsible for the appeal should review the appellant's qualifications and follow the Boards' interim procedures for award of fees and expenses under EAJA.

#### **A3-313 Appeals Management and Case Tracking.**

The Office of Counsel is required to enter and update all its appeals in the USACE Legal Services Automated Case Management System - CMIS, or its successor.

a. New Appeals. In most instances, the basic information concerning the claim which is the subject of the appeal is already in the database. In such cases, the trial attorney shall update the information by changing the category of the entry from C (claim) to A (appeal) and adding the ASBCA or the ENG BCA as the forum and the docket number. A new, separate case should not be entered. If the claim was not entered into the database during the claim stage, the following information must be entered for each appeal: the name of the appellant/contractor, the forum and docket number, the contract number, the project and location, the relief requested, the date of the contracting officer's final decision, the trial attorney assigned to the appeal, and a brief narrative description of the facts and issues.

#### **A3-400 Scope of Subpart.**

This subpart sets forth procedures for handling Contract Disputes Act litigation before the U.S. Court of Federal Claims. See 41 U.S.C. 609.

Throughout this subpart, the term local counsel shall mean District Counsel, Operating Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel.

#### **A3-401 Responsibilities.**

a. Department of Justice (DOJ). DOJ is responsible for Contract Disputes Act cases in the U.S. Court of Federal Claims. 28 U.S.C. 518.

b. Corps of Engineers. The District, Laboratory, or FOA Counsel will assign a trial

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attorney to prepare a litigation report and to assist the DOJ attorney assigned to the case.

#### **A3-402 Notice of Filing.**

a. Department of Justice. When a complaint is filed, DOJ notifies the agency by sending a transmittal letter stating the name and telephone number of the DOJ attorney assigned to the case and requesting that the Corps trial attorney assigned to the case contact the DOJ attorney. The letter also requests a litigation report and draft answer.

b. Corps of Engineers. The Chief Trial Attorney will forward the DOJ letter and complaint to the Corps District, Operating Division, Laboratory, Center, or FOA responsible for administration of the contract at issue, with a copy to the Division Counsel where applicable. The Chief Trial Attorney's letter will establish a suspense for submitting the litigation report and contain instructions for complying with DOJ's requests.

#### **A3-403 Litigation Report.**

a. Procedures. Except in those instances when time does not permit and prior telephonic approval of deviation from this procedure is obtained

The Corps trial attorney assigned to the case is responsible for keeping the Chief Trial Attorney fully informed of all significant events that occur as the case progresses. This requirement includes furnishing the Chief Trial Attorney a copy of all pleadings, motions, and briefs filed; keeping CMIS or its successor completely updated (see A3-408); and advising the Chief Trial Attorney by telephone or electronic mail when hearings are scheduled.

#### **A3-405 Alternative Dispute Resolution (ADR).**

a. Third party assisted. Executive Order 12988 concerning civil justice reform, encourages litigation attorneys to use ADR. The Corps trial attorney will assist the DOJ attorney in using ADR.

b. U.S. Court of Federal Claims assisted. General Order 13 of the U.S. Court of Federal Claims established two methods of ADR for use in cases before the court: settlement judges and mini-trials. The settlement judge procedure contemplates

from the Chief Trial Attorney, two copies of the litigation report and exhibits, one for the DOJ attorney and one for the Chief Trial Attorney, will be submitted directly to the Chief Trial Attorney. An additional copy should be sent to the Division Counsel in Command and Control Divisions as each requires. Bulky or voluminous exhibits may be omitted from the Chief Trial Attorney's copy of the report with prior permission of the Chief Trial Attorney.

b. Form. The litigation report shall contain (1) a narrative statement of facts and listing of exhibits; (2) a suggested answer; (3) a list of witnesses; (4) a legal analysis; and (5) information concerning any known counterclaim, set-off, or other cause of action which may be asserted against the plaintiff by the Government. The statement of facts may be summarized from the contracting officer's final decision. A legal memorandum prepared for the contracting officer's use in considering the claim may be used as the required legal analysis if it addresses all of the relevant legal points. The exhibits shall consist of a compilation of documents prepared in the same manner as an appeal file before a Board. See generally A3-303.

#### **A3-404 Significant Events.**

a frank, in-depth discussion of each party's case before a neutral advisor. The mini-trial is a flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties in negotiating a settlement. Corps trial attorneys are strongly encouraged to work with the DOJ attorney in utilizing these procedures to the maximum extent practicable.

#### **A3-406 Settlement.**

Authority to settle the case is vested solely in the Department of Justice. 28 U.S.C. 516, 519; Exec. Order No. 6166, June 10, 1933, reprinted in 5 U.S.C. 901. All recommendations concerning settlement of cases in the U.S. Court of Federal Claims will be made by the Chief Counsel to DOJ. The Corps trial attorney assigned to the case, in collaboration with the contracting officer, is responsible for forwarding the settlement recommendation, including an explanation of the

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proposed terms and the reasons why the Government should or should not agree to them, through the command channels, to the Chief Trial Attorney. The Chief Trial Attorney will prepare the recommendation for the Chief Counsel to send to DOJ. An exception will be made when, pursuant to General Order 13, the court requests that the agency representative have full settlement authority.

d. Settlement of Cases. Authority to settle cases in the Federal courts is vested in the Department of Justice. Once litigation is docketed before a Federal court, the contracting officer loses all authority to settle the case. See United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir. 1978). However, the Chief Counsel reserves the authority to make the agency recommendation on settlement offers.

#### A3-407 Decisions.

c. Appeal. Recommendation for appeal of an adverse decision will be made by the Chief Counsel to DOJ. When the trial attorney assigned to the case believes an appeal is warranted, the trial attorney and the local counsel will contact the Chief Trial Attorney informally to discuss whether an appeal is appropriate. If an appeal is warranted, the trial attorney shall forward a written appeal recommendation, including a thorough analysis of the facts and law, through command channels to the Chief Trial Attorney. The Chief Trial Attorney will coordinate with the Office of the Army General Counsel and prepare the agency recommendation for the Chief Counsel to send to DOJ.

d. Payment. In cases where the U.S. Court of Federal Claims issues a decision sustaining the appeal, payment will be made in accordance with Judgment Fund procedures.

#### A3-408 Case Management and Tracking.

The Office of Counsel is required to enter and update all cases in the USACE Legal Services Automated Case Management System - CMIS, or its successor.

a. Notice. The Corps trial attorney assigned to a case is responsible for notifying the Chief Trial Attorney of all decisions rendered by the U.S. Court of Federal Claims. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Chief Trial Attorney. A copy of the decision shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires.

b. Motion for Reconsideration. A motion for reconsideration is governed by Rule 59 of the Rules of the U.S. Court of Federal Claims. The motion must be filed within 10 days of the entry of judgment. The Corps trial attorney assigned to the case should forward any recommendations concerning the Government's filing a motion for reconsideration through command channels to the Chief Trial Attorney within 5 days of the entry of judgment. The Chief Trial Attorney will prepare the agency recommendation for the Chief Counsel to forward to DOJ.

a. New Cases. In most instances, the basic information concerning the case is already in the database. In such cases, the trial attorney shall update the information by changing the category of the entry from C (claim) to A (appeal) and adding the U.S. Court of Federal Claims as the forum and the court's docket number. A new, separate case should not be entered. If the claim was not entered into the database during the claim stage, the following information must be entered for each case: the name of the plaintiff/contractor, the forum and docket number, the contract number, the project and location, the relief requested, the date of the contracting officer's final decision, the trial attorney assigned to the case, and a brief narrative description of the facts and issues.

b. Updating Case Information. The database should be updated as significant events occur, including the filing of pleadings, dispositive motions and briefs, and the scheduling of hearings, trials, and ADR. When the court renders a decision or a case is settled and dismissed by the court, the case should be closed on the database and the following information entered within 5 working days:

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the disposition of the case (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

#### **SUBPART 500 - APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

##### **A3-500 Scope of Subpart.**

This subpart sets forth procedures for handling appeals at the U.S. Court of Appeals for the Federal Circuit pursuant to the Contract Disputes Act, 41 U.S.C. 607(g)(1)(A).

##### **A3-501 Notice of Appeal.**

###### **a. Contractor Appeals.**

1. Department of Justice (DOJ). When an appeal is filed, the DOJ notifies the agency by sending a transmittal letter stating the name and

##### **A3-502 Responsibilities.**

a. Department of Justice (DOJ). DOJ is responsible for Contract Disputes Act cases in the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. 518(a). The DOJ attorney assigned to the case is responsible for representing the Government to include preparing and filing the Government's brief and participating in oral arguments.

b. Corps of Engineers. The assigned trial attorney shall provide assistance to the DOJ attorney in preparing the Government's brief and conducting oral argument. The trial attorney shall also have the responsibility of notifying the Chief Trial Attorney of significant events in the case as defined below.

##### **A3-503 Significant Events.**

The assigned trial attorney is responsible for keeping the Chief Trial Attorney fully informed of all significant events that occur as the case progresses.

This requirement includes furnishing the Chief Trial Attorney a copy of dispositive motions and briefs filed

telephone number of the DOJ attorney assigned to the case and requesting that the Corps trial attorney contact the DOJ attorney. The letter indicates that upon filing of appellant's brief, the DOJ attorney will promptly furnish a copy with a request for comments to the trial attorney. The letter also requests that the trial attorney provide advice as to which parts of the record should be included in the appendix.

2. Corps of Engineers. The Chief Trial Attorney will forward the DOJ letter and notice of appeal to the Corps District, Operating Division, Laboratory, Center, or FOA responsible for administration of the contract at issue, with a copy to the Division. The Chief Trial Attorney's letter will direct the assigned attorney to comply with DOJ's requests for advice, to keep the Chief Trial Attorney informed of significant developments in the case, and to keep the appeal updated on CMIS.

b. Government Appeals. Appeals of ASBCA or ENG BCA decisions shall be made according to the procedure set forth in A3-311(c). Appeals of U.S. Court of Federal Claims decisions shall be made according to A3-407(c).

and keeping CMIS or its successor completely updated (see A3-506).

##### **A3-504 Oral Argument.**

When oral argument is scheduled, the assigned trial attorney shall inform the Chief Trial Attorney of the date and indicate who will be attending.

##### **A3-505 Decision.**

The assigned trial attorney is responsible for notifying the Chief Trial Attorney of the decision rendered by the U.S. Court of Appeals for the Federal Circuit. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Chief Trial Attorney.

##### **A3-506 Appeals Management and Tracking.**

The Office of Counsel is required to enter and update all appeals in the USACE Legal Services



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Automated Case Management System - CMIS, or its successor.

a. New Appeals. The basic information concerning the appeal is already in the database. The trial attorney shall update the information by changing the forum to the U.S. Court of Appeals for the Federal Circuit and adding the appellate docket number. A new, separate case should not be entered.

b. Updating Appeal Information. The database should be updated as significant events occur including the filing of motions, briefs, and the scheduling of oral arguments. If the appeals court renders a decision remanding the case to a Board or the U.S. Court of Federal Claims, the decision should be recorded in CMIS, and the forum and docket number in the case file should be changed to show where the case is now pending. When the appellate court renders a final decision or a case is settled, the appeal should be closed and the following information should be entered within 5 working days: the disposition of the (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.